

MINUTES
SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE: Monday, March 12, 2012

TIME: 1:30 P.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman Pearce, Vice Chairman Bair, Senators Cameron, Siddoway, Brackett, Heider, Tippetts, Werk, and Stennett

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CALL TO ORDER: **Chairman Pearce** called the meeting to order at 1:35 p.m.

APPROVAL OF MINUTES: February 13, 17 and 27, 2012

MOTION: **Senator Brackett** made a motion, **seconded** by **Senator Siddoway** to approve the minutes of February 13, 2012. The motion **passed** by a **"voice vote."**

MOTION: **Senator Tippetts** made a motion, **seconded** by **Senator Heider** to approve the minutes of February 17 and February 27, 2012. The motion **passed** by a **"voice vote."**

COMMITTEE CONSIDERATION OF GUBERNATORIAL NOMINATION: **Chairman Pearce** reminded the Committee they needed to vote on the Gubernatorial nomination for **Chris Korell**, Outfitters and Guides Licensing.

MOTION: **Senator Siddoway** moved, **seconded** by **Vice Chairman Bair** to send the gubernatorial appointment of Chris Korell, Outfitters and Guides Licensing, to the floor with the recommendation that it be confirmed by the Senate. The motion carried by a **"voice vote."** **Senator Siddoway** will carry the recommendation on the floor.

H 495: Relating to State Endowment Lands.

PRESENTATION: **Representative John Vander Woude** presented this bill. According to the Idaho Constitution, Article 9, Section 4 and Article 9, Section 8, this proposed legislation is designed to clarify procedures of the Land Board, to the extent that they may more ably discern between government and private sector properties. Additionally, it encourages expedited handling of land sale proceeds to better protect the constitutional mandate of seeking the best long term benefit of the endowment beneficiaries.

He indicated this bill was to better protect the endowment funds of our schools and outline how money was to be invested. Two years ago, the Land Board bought and is now operating a self-storage business in Boise. They have stated in their asset management plan that their goal is to seek out and purchase the most profitable businesses so they may get a better return for the beneficiaries. This creates an unfair advantage for all small businesses that may be in the same business as the state may get into. The state does not pay property taxes but still gets all the city protection services, such as fire and police. The state does not pay income tax on profits and the state is self-insured so it does not have that expense. Should the state lose money, it is less money going to the schools. Any business will have a difficult time competing with all these advantages against them.

Representative Vander Woude said we would hear that we need to look at things over the long term and not the small snapshot. The state has been in the commercial property business for 10 years and their rate of return is about 1.23%. They have a building that has about a 70% vacancy rate. The storage business they have had for about two years and they are bragging about their good short-term investment. He said he cautioned that as one looks at the short-term numbers, as in any business, one looks at depreciation. The state does not count depreciation into their operating costs as many businesses do. He said that anyone who has gone to a self-storage place can quickly see that these are not highly structured, solid buildings, and only last for a certain length of time. We should really look at how long the life is of a building and how long we have before that asset is no longer worth anything. **Representative Vander Woude** said we have buildings in the Capitol Mall the state would really like to tear down because they no longer have value. When we look at the return to the endowment fund, we are mandated by the Constitution to look at the long-term return. He pointed out that on page 27, in the State Asset Management Plan, they have stated they would like to acquire farm land in the path of urban expansion. This sounds like land speculation to him. He queried, is that what we want our endowment funds invested in?

He said property three or four years ago probably was selling in his area for \$50,000 to \$60,000 an acre. Now one would be lucky to get \$10,000 for it now. That is what happens with land speculation. He gave several examples, including several people who went in on the LID with the Kuna Sewer Plant. They figured that \$10,000 an acre was going to be the cost, but they were going to sell their land for \$65,000 so it looked like a good investment. Now, they have no value. That, he said, is what happens if we start investing in land and speculating on what the return is going to be.

Representative Vander Woude said the state said they would like to go into businesses. He gave an example of Blockbuster Video that was here in this valley 10 years ago. It was one of the hottest little businesses one could find in every shopping mall. Where are they now? They are bankrupt and gone.

Is that what we want to invest our money into? He said we don't. We need to look at what is the proper role of government. Is it to be in direct competition with the private sector? He said he hoped the Committee would say no, that is not the proper role of government. The government should not be out there competing in the private sector with all the advantages they have. He added that even if the state needs repairs done on their businesses, it is all tax free as they don't pay sales tax on those repairs either.

There are a lot of different revenue sources that private business pay into the state. The state doesn't pay and they can make their return look a lot better. He cited the business he is in, if he didn't have to pay property tax or income tax, he might not need this job to keep things going. He would like this advantage himself, but he does not have it and he does not believe the state should have it either as it competes against him. If the state wants to buy a gas station or if they want to buy a dairy, he would be more than glad to sell the state his dairy as he has not made any money from that in five years. He turned the rest of the presentation over to the co-sponsor, **Representative Burgoyne**.

Chairman Pearce asked the Committee if they had any questions. **Senator Tippets** asked **Representative Vander Woude** about the investment and endowment funds in the constitution indicating the investment must be at the highest rate of return and he asked to have that section identified. He deferred the answer to **Representative Burgoyne**, who said it was in Article 9, Section 8.

Senator Heider stated that when he normally deals with his investments, he has been told to diversify his portfolio. Is it not a wise investment that we invest in some commercial as well as bare land. **Representative Vander Woude** said it would be if one could get a good return. But he said, look at their track record of 1.23% over the 10 years they have been in commercial property and say if it is very marginal or whether that is a good rate of return. He further stated, the state does have diversification because they have the permanent endowment funds that are already invested in stocks and all the other types of entities and there is commercial property at Payette and Priest Lake, a residential property, and commercial property that is now downtown. They would like to expand and centralize our holdings into one area, which, he thought, would unduly affect the commercial property in Boise because the goal of their asset management plan is to increase the commercial property they currently have in Boise.

Senator Cameron said **Representative Vander Woude** artfully spoke about the differences between state government, local government and he said the bill approaches those differences in one direction. He said he wanted to know if he considered changing the exemption so that state government, local government had to pay property tax and sales tax and leveling that playing field because that would be another approach. **Representative Vander Woude** said they looked at that area, but when one looked at state by state different holdings and what is exempt and what is not as far as buildings and businesses, it becomes real tricky as to what one would classify as having to pay taxes or income taxes, property taxes and it would complicate the issue even more than this would be in trying to solve it that way.

Senator Cameron said to **Representative Vander Woude** that some of them, a couple of years ago, or even last year, when they were looking dramatically for revenue, that became a discussion point that perhaps we ought to level that playing field on taxation across the board. He said his next question, was it the intention that the state should not engage in purchasing anything that could potentially be considered competing with the private industry and he wanted to know how that comports with our existing provisions for grazing leases, etc., etc. **Representative Vander Woude** said it was his intention that the state not be in the type of business that would require a separate business license as the self-storage unit is and it is not their intention that they should get rid of their garages or office space. He wished they would manage it better, it is not his intention they would have to dispose or get rid of all of that. When one starts to operate as a separate business entity, that requires a license from the state in order to operate in and that is where he thinks they have crossed the line.

Senator Brackett said that using the example of the storage units, if the state would contract with a management company, then would that be satisfactory?

Representative Vander Woude said that would not work as long as they owned the business. He believed they would have to sell the business entity. He said his intent with this bill is they can still own the property, they can still own the buildings, but the business entity itself, they would have to sell. They could sub-lease, it could be a lease-purchase or whatever, but somebody else would technically operate that business and be on a different tax ID and everything else for the purpose of the business.

Senator Brackett said he had questions about the constitutionality. One must act in the sole benefit or for the sole interest of the beneficiary and that is to maximize interest for the endowment and it seemed to him that this gets fairly close to crossing the line as far as a constitutional issue. He asked to have the opinions in the packets condensed and help with the information.

Representative Vander Woude said the opinion that he has come from David Leroy who said this was a constitutional prerogative and what we forgot was when we read "as a sole beneficiary" that may be prescribed by law, which gives us some legislative authority over how that was done and he believed that cleared up the constitutionality of the bill before them. **Senator Brackett** said that in his past experience with the grazing leases, the law was passed and it was found to be unconstitutional.

Senator Stennett asked **Representative Vander Woude** if he felt if it was in the best interest of the endowment lands for the legislature to be controlling this over the Department of Lands? She said we were asserting ourselves into the direction of the Lands with this bill and she wanted to see if he felt this was correct.

Representative Vander Woude said he didn't think a lot of power was given and that this was very limited and it gave them one certain area where we thought they have crossed the line and he thought that if the endowments didn't perform, the legislature would have to pick up the tab for the schools. We do have to watch how that money is invested and what type of returns are given because the state legislature is responsible.

Representative Burgoyne addressed the Committee and made comments on the various questions that were asked. He talked about the issue of contracting with a management company and he said what this bill does is draw a line. This bill says the Land Board can deal with land and the improvements on land. So, the landlord can buy commercial property and own the improvements in an office building, for example, and lease the office space to businesses. This bill does not prescribe that. With respect to the storage units, this bill says we can buy the land and they can buy the storage unit complex. What this bill says is that the landlord cannot operate the business that runs the affordable storage business that leases itself to others, although the land and the improvements can be leased to a company that does that. He drew an analogy with a shopping center. He said a shopping center could be owned by the state of Idaho, the land and the improvement, which is the building, and the spaces can be leased to retailers. What this bill says is the state of Idaho can't own Sears, the shoe store, etc. The state of Idaho can contract with a company that wants to operate portable storage.

Representative Burgoyne said he would like to address the constitutionality and he referred the Committee to Mr. Leroy's opinion. He pointed out that the Attorney General issued an opinion last spring when H 188 was brought before the House Resources Committee and the constitutionality was questioned. He said they attempted to redraft and take account some of the things the Attorney General said. Mr. Leroy was asked for an opinion by the House Committee and gave one, was subject to the limitations of the Idaho Admission Act, which authorizes the sale, lease and exchange of the endowment of lands. With respect to government lands, Article IX, section 8 of the Idaho Constitution, the legislature has the legal authority to direct the Land Board in the manner described by the questions presented. He went over the three questions presented and the conclusion by Mr. Leroy. A copy of the legal opinion dated February 24, 2012 is attached to the minutes.

The three questions were: 1) Does the Idaho Legislature have the legal authority to direct the Land Board to sell all non-agricultural business operations located on state endowment lands to private persons? 2) Does the Idaho Legislature have the legal authority to direct the Land Board to lease or sell any non-agricultural improvements on state endowment lands to private persons? and 3) Does the Idaho Legislature have the legal authority to limit the length of time that proceeds from the sale of endowment lands may be deposited to six months?

The conclusion was stated in the opinion of Mr. Leroy as subject to the limitations of the Idaho Admission Act, which authorizes the sale, lease and exchange of endowment lands, and Article IX § 8 of the Idaho Constitution, imposing trust obligations on the state with respect to endowment lands, the legislature has the legal authority to direct the Land Board in the manner described by the questions presented.

Representative Burgoyne said it was his personal opinion, after reading the admission bill and having read the constitution, he did not think the landlord had the constitutional ability to operate the affordable storage business. He said he didn't think the admission bill was at all clear. It says that the state of Idaho is authorized to deposit in a land bank fund to be used to acquire, in accordance with the state law, other land in the state. He said that when the state of Idaho sells land and the money comes into the land bank fund, the admission bill limits the use of those funds to buying land. He said he felt that was very clear. He said, in his opinion, to buy the grocery store in the shopping center or the shoe store, was not constitutional. This bill makes that clear in statute. The Land Board's authority is to buy land and it does not say to buy businesses. We diversify through the permanent endowment fund and through passive investments in the commercial marketplace.

He cited Article IX, Section 4 having to do with the public school permanent endowment fund. Part of that section says that if those proceeds are not used to acquire other lands with any time provided by the legislature, the proceeds shall be deposited into the public school permanent endowment fund. The constitution does not expect that the landlord will be dealing with the individual businesses or owning these retail type retail businesses. The permanent endowment fund is for this generation and future generations of children.

The constitutional authorization, according to Section 7 of Article IX, provides the state board land commissioners shall have direction, control and disposition of the public lands of the state. The constitutional authorization is of the public lands. This bill implements the provisions of the constitution.

Representative Burgoyne said the question of diversification has come up a great deal. Diversification in and of itself is not a good thing if one is diversifying into unsound or risky investments. He believes the endowment should be diversified, but we shouldn't diversify into everything.

Representative Burgoyne talked about the issue of taxes. He queried if decisions were going to be made on the basis of market considerations or will they be made because the landlord is a political body and will those decisions be made on the basis of politics? Will the decisions to be made that appear to be in the private marketplace really be decisions that are the result of lobbying political figures. He said he thought it would be the latter. There is a real issue when one politicizes the marketplace and about the soundness of the economy and the state whether or not the endowment is being pursued for political reasons or for the trust obligations for school children and the others who benefit from the endowments in this state. It should not be legal to do this. In his opinion, if we don't adopt this bill, we will be opening the door to the possibility of that. He said he did not think that anyone at the Department of Lands intended to do this. He asked if we wanted that kind of conduct to be legal? He felt the answer was no.

He said it is one thing for the state of Idaho to own a grazing lease, to own agricultural land and to lease the grazing rights or to lease the agricultural land to a farmer or rancher. It is entirely a different proposition for the state of Idaho to be the farmer or the rancher and this is where this bill draws the line.

Representative Burgoyne referred to the question asked by **Senator Stennett** whether the legislature would be asserting itself over the Idaho Department of Lands. He said he didn't think this was what this bill did. He said he thought this bill constitutionally prescribes by law, what a landlord may do in this area and not the Department of Lands.

Representative Burgoyne referred to page 1 of the bill and said it was a statement of legislative findings. He quoted from the bill, Section 58-104, lines 22 and 35, a copy of which is attached to the minutes, referring to the constitutional authorization of the Idaho legislature to regulate the procedure of the Idaho state land commissioners. Subsection IV, line 41 carrying over to page 2 sets out certain trust principles from cases. Trust assets are for the benefit of the present and future generations and constitute a trust of the most sacred and highest order. He said he thought, "shall forever remain inviolate and intact" was a very important principle. He said if he had a trust obligation to future generations, how one assesses risk and what one does about risk becomes an entirely different calculation.

Representative Burgoyne referred to the trust assets starting at line 3 of page 2 and said they must be managed to foster and promote their long term stability and permanency. The use of the trust assets and the acquisition, holding, owning or operation of a potentially unlimited spectrum of business enterprises by the Idaho state board of land commissioners, will expose trust assets to undue risk of loss. He said if one looks at the plans that have been in existence in the last decade or so and you look at the two citizen type committees that were appointed and who studied these issues, what you see is a desire to enter into a broad range of commercial businesses as direct owners, not as diversified passive investors. Where would one get the expertise to run a specialized company? He said he did not mean to suggest that there is a lack of expertise in the Department of Lands, but the Department of Lands has about 120 years of institutional experience dealing with our traditional public lands, not running shoe stores or fast food restaurants. The failure rate of new businesses is pretty high and it presents very unique and special risks.

He quoted the restrictions of Section 2 on page 2, lines 24-29. Essentially, it says that all non-agricultural improvements on said land shall be leased or sold. So, the state does not have to sell all of the improvements. They can own an office building and they can lease the office space in the office building. Section 3 on page 3 is there because 58-104 (a) needs to be changed to (b), a technical correction and Section 4 of the bill on page 4 is there to deal primarily with a change on line 11 and in Section 3, the five year limitation on monies in the land bank to six months. Section 5 of the bill relates to a change in 5-246 that is found on page 5 of the bill, line 21, where 58-104 is changed to 58-104 (a) because of the citations in the bill.

Representative Burgoyne said he agreed with Mr. Leroy's opinion and he said he felt it more soundly addressed the issues that were raised by the bill.

Senator Stennett said his presentation explained a lot of things. She asked how does it differ from owning the property and leasing not only the property, but outsourcing or leasing the business within the building and not actually having the Department of Lands people actually operating shoe stores.

Representative Burgoyne said the difference he saw was that when the state retains ownership, it retains risk of financial loss for the operation of the business. There is some financial risk in owning the building and the improvements.

Senator Stennett asked why there was a restriction from operating from five years down to six months. She said it appeared to be a drastic change rather than two years or somewhere in between.

Representative Burgoyne said he thought six months should be enough if appropriate pre-planning is done so that instead of bumping up against the deadline of keeping money in the land bank. The six months will be a strong signal to a landlord to preplan where they are going to reinvest when they sell land, rather than using the land bank fund as kind of generalized thought of "we are just going to see what develops and what opportunities exist" kind of fund.

Senator Stennett asked **Representative Burgoyne** to address what if the land board chooses to divest themselves of the cottage sites and they become suddenly "flush" with a bunch of money they now have to do something with in six months. One would want to take advantage of the opportunity of those people that have come forward to buy their leases in these cottages. One may not necessarily have immediate turnaround where those funds should go.

Representative Burgoyne said to look at what is being proposed. He stated there was a proposal for a land trade. He said the landlord should be that of a dealer of the land and he believed that trades would be a better practice than getting them and holding cash. He also said there is the idea out there that somehow putting money into the permanent endowments is not as good an idea as investing in a storage unit. He said he disagreed and that moving money into permanent endowments is probably a very good idea. He said he supports exposure to the marketplace passively and he has no objections.

Chairman Pearce asked what the ten year return was on the endowment fund that has been invested. **Representative Burgoyne** said he did not know.

Senator Tippets said the Senate just passed IGEMS, which sets up an opportunity for the state to work cooperatively with the universities for private enterprise, with the universities working on research in the private sector, working on the application for that research. In questioning the director of the Department of Commerce, he asked what types of business arrangements might eventually arise from that cooperation. He was wondering if this would prohibit entering into this kind of arrangement and maybe prohibit endowment of lands funds from being invested in that kind of venture or were there other ways this legislation could affect this kind of arrangement.

Representative Burgoyne said he did not think this bill affects IGEMS, but he wanted to point out that his concern with the government entering the private marketplace has to do with the endowments. He said the government was in the marketplace when it comes to county hospitals. He said his concern was practicality. He said he completely supported IGEMS and he did not see a conflict between the bill. However, an IGEM activity being located on endowment land, he thought that would be permissible, as long as it is not an activity undertaken by the landlord in its capacity as the trustee of these endowments.

Senator Tippets asked if the state wanted to enter into a business partnership arrangement with the private sector and they wanted to locate the business on endowment lands, did **Representative Burgoyne** believe that this bill would allow that to happen when the state is partial owner of that business? **Representative Burgoyne** answered that a landlord could not enter into that business relationship, but a university could. If that business relationship approached the landlord and the Department of Lands, either leased land or leased an improvement on that land, as any third party could, such as a grocery store, then they could do that in that capacity. He said he did not see anything in this bill to prohibit that because a landlord would not be a party to the business relationship, it would be a landlord.

TESTIMONY: No one testified in **support** of this bill.

The following people testified in **opposition** to this bill: **Laurie Bocickel**, Idaho PTA Legislative Vice President. She expressed a great concern related to what the impact of this bill will have on beneficiaries based on the management of the endowment lands. She said the Idaho PTA encourages Idaho state officials to take all necessary steps to manage the school trust lands and the school endowment funds in accordance with the trust duties and principles, including undivided loyalty to beneficiaries and a duty to make trust property productive in the long term as well as the short term. She cited the Statement of Purpose and said she could not help but ignore the fact that this all seems to be tied to the latest investment. The high return does not seem in the best interest of the beneficiaries.

TESTIMONY: **Robert Forrey**, from southwest Ada County and representing the Tax Accountability Committee, said he thought the Idaho Legislature was overstepping their bounds. A copy of all of his testimony is attached to the minutes.

Senator Stegner, University of Idaho President, said he opposed the bill and requested it be held in Committee. He said the bill restricts the ability of the landlord from considering and investing in diverse investment options that would result in a conflict of the constitutional responsibility and maximize the return for beneficiaries. He said he was prepared to talk about the University of Idaho's potential impact if this bill were to be enacted, but due to time constraints, he said he would yield to questions and other presenters.

Vice Chairman Bair said he would like **Senator Stegner** to delve into the dairy research issue. **Senator Stegner** said the University of Idaho was interested in having a world-class dairy research operation in southwestern Idaho. At one point, the state of Idaho was going to make some contribution into that effort, but that money was needed and pulled back and the whole project has been on hold for some time. Because of the confusing language in this particular bill and because of the restrictions it appears to put in place for businesses, they have concerns in: 1) whether or not they would be able to make land exchanges that would be the basic plan for acquiring the land for this facility; and 2) they are concerned that the language would be so restrictive and so limiting that the University of Idaho as the lessor or the owner of endowment lands, may be restricted from entering into non-agricultural, which is not defined very well in the bill. Some of the operations would be essential for making that operation successful.

Senator Stegner said that if there was a research dairy herd, dairy cows would have to be milked at some point. Then the product would have to be disposed of, entering into just not agriculture, but Ag business, limiting the effect. The University might want to engage in additional research and commercial interests. It is a major concern and has been expressed by the administration. We think it is very cumbersome language that is very uncertain for some of the things they may want to undertake.

Chairman Pearce said that if they were to amend the bill to clarify that they could do a dairy research project, would the University feel like they could support the bill. **Senator Stegner** said he was doubtful they would be able to do that with the waning days of this legislature. He said it might have an effect on some other aspect of the University of Idaho research, such as medicine, high tech, development of an electrical engineering apparatus, it could be in forestry or in any number of things they may want to be engaged in for the next 120 years. They find this, at least for the moment, to be restrictive. He said, however, maybe they could find an agreeable language over the course of some discussion or negotiations, potentially they could, but not in the matter of days this legislature runs, he felt was problematic.

Senator Stennett asked **Senator Stegner** that what he is doing in terms of this would be the business of the University and really all he is doing is a partnership to operate off the Department of Lands. She said she was trying to clarify where those divisions are made, where it is that it is the ownership of the University, as opposed to the Department of Lands ownership. They are just providing that you could be an operator on their property and that you are in charge of that whole venture that you are talking about with the dairies. **Senator Stegner** said he was not sure if he knew the answer and he directed her to page 7 of the Attorney General's opinion where they address this very specific area of this bill. They say the intent of the meaning of the proposed revision is difficult to discern in plain language. He quoted page 7, the second paragraph, "the phrase except where the land is used by a public entity for a public purpose defies easy interpretation." He said the focus on the Attorney General's opinion is the vagueness of some of the specific language and he does not think it is as clear. He said he thought the Idaho courts will likely find this bill unconstitutional and that is the primary focus.

TESTIMONY: **Todd Hatfield**, from McCall representing himself as a small business owner, said he thought the bill was over the phrase of long term financial return. He said the bill puts a maximum limit on how the maximum return has to be obtained. He read a few excerpts from the proper role of government quoted by Governor Otter. He said he was opposed to socialism either in whole or in part. He indicated the University of Idaho is conducting economic development workshops, along with the Idaho Council of Governments (SAGE) and the Department of Commerce, trying to solve our high unemployment rate in our economy. He said this bill will kill the economy and private industry by having the state compete with private businesses.

Chairman Pearce said this item and the other items on the agenda would be continued to Wednesday, March 14, 2012 at 1:30 p.m. as they were out of time.

ADJOURNMENT: **Chairman Pearce** adjourned the meeting at 2:57 p.m.

Senator Pearce
Chairman

Linda Kambeitz
Secretary